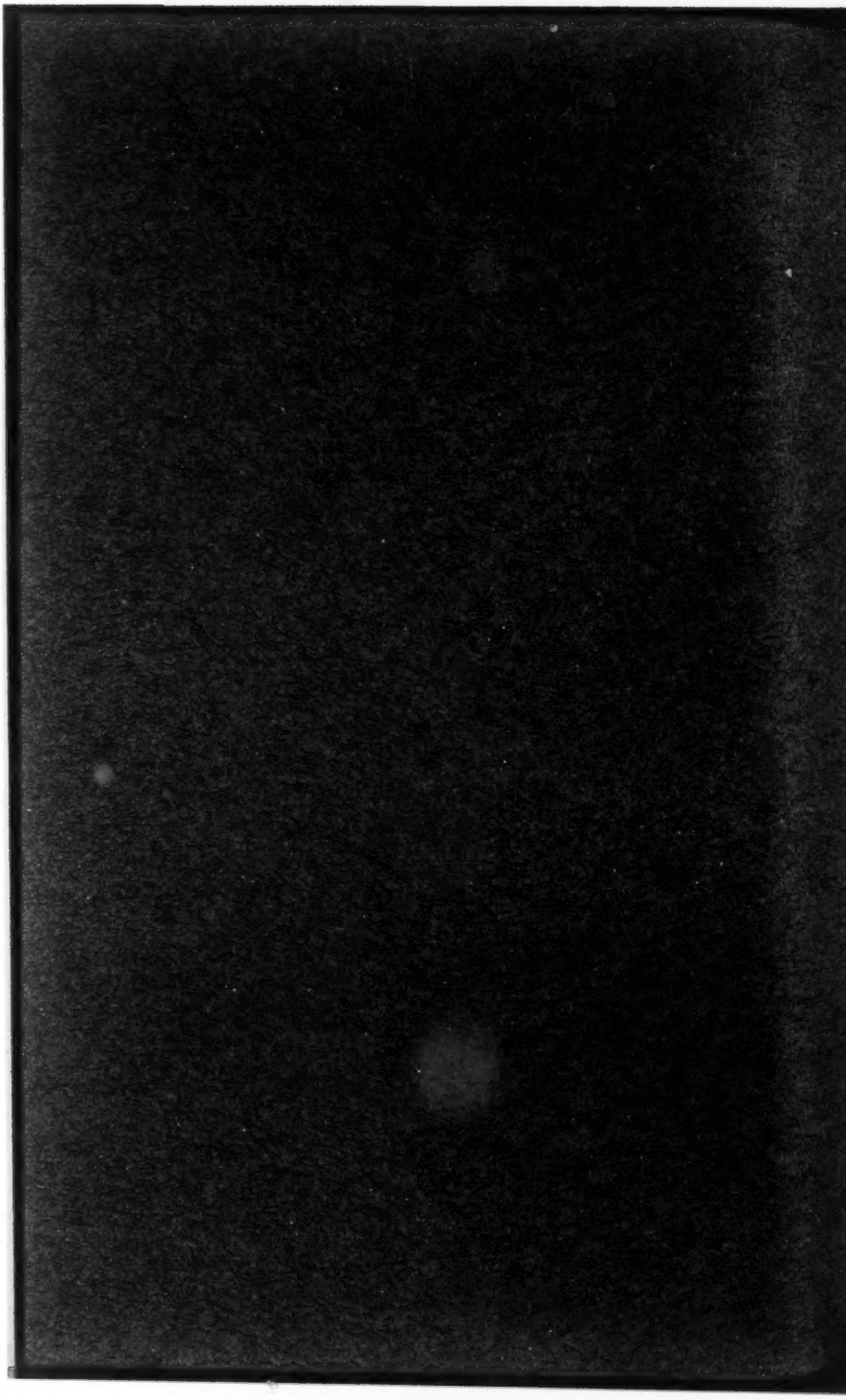

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	4
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Ardbern Co. v. *Commissioner*, 120 F. 2d 424	5
Del Mar Addition v. *Commissioner*, 113 F. 2d 410	6
Mother Lode Co. v. *Helvering*, 317 U. S. 222	4, 5
Riley Co. v. *Commissioner*, 311 U. S. 55	4, 5
Scaife Co. v. *Commissioner*, 314 U. S. 459	6
Statutes:	
Internal Revenue Code:	
Sec. 23 (26 U. S. C., Sec. 23)	7
Sec. 53 (26 U. S. C., Sec 53)	9
Sec. 114 (26 U. S. C., Sec. 114)	4, 7
Sec. 187 (26 U. S. C., Sec. 187)	9
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 23	4
Sec. 53	9
Sec. 114	9
Sec. 187	10
Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 145 (26 U. S. C., Supp. II, Sec. 114)	5
Miscellaneous:	
Treasury Regulations 101, Art. 23 (m)–5	12
Treasury Regulations 103, Sec. 19.23 (m)–5	10

554847—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 379

JOE DEGNAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23–30) is reported at 47 B. T. A. 122. The opinion of the Circuit Court of Appeals (R. 50–57) is reported at 136 F. 2d 891.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 29, 1943 (R. 57). Petition for a writ of certiorari was filed September 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an election to compute depletion on a percentage depletion basis is made in a "first return" as required by Section 114 (b) (4) of the Internal Revenue Code, either when stated in a delinquent return for the year in which income was originally derived from the property or in a timely-filed return for the subsequent year.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 7–12.

STATEMENT

Petitioner was an equal partner in a partnership known as Degnan and Rosander (R. 23). On or about May 12, 1938, the partnership acquired a metal mine near Ophir, Alaska. The first items of income from the property were derived and the first items of deductible expenses were incurred by the partnership during the calendar year 1938 subsequent to May 12. (R. 23–24.)

All of the net income of the partnership for 1938 was distributed to the petitioner pursuant to an agreement between the partners. Petitioner reported all items of income derived from the property during 1938 in his individual return for that year. He claimed deductions in respect of the property and a net income therefrom was

included in his taxable income. He did not claim any deduction for depletion in respect of the property. Rosander did not report any part of the income realized from the property in his return for 1938, nor did he claim any deduction in respect of the property for that year. (R. 24.)

The partnership did not file a return for the year 1938 until September 18, 1940, when a return was made to the Collector of Internal Revenue at Tacoma, Washington. The return disclosed gross income of $5,400 and total deductions of $2,571. The deductions included the amount of $810 representing depletion computed on a percentage basis (R. 24). The following notation appeared on the face of the return (R. 24–25):

> We elect to take depletion on the basis of 15% of gross as provided by law.

No request had been made by or on behalf of the partnership for an extension of time within which to file its return for the year 1938, and no extension was granted (R. 25).

The partnership filed a timely return for the year 1939 on March 29, 1940. Included among the deductions reported on that return was the amount of $5,110.30 representing depletion claimed on the percentage basis. The following notation appeared on that return (R. 25):

> Election is hereby made to take depletion on the percentage basis as provided in

section 114 (B) (4) Revenue Act of '32 and '34.

In determining a deficiency against the petitioner for the tax year 1939, the Commissioner disallowed the depletion allowance claimed in the partnership return, on the ground that the election to take percentage depletion, required by Section 114 (b) (4) of the Internal Revenue Code, had not been made in a timely return filed for the year 1938 when income from this property was first realized; a smaller deduction was allowed computed on the basis of cost, thus increasing the petitioner's net income from the partnership (R. 10–11). The Board of Tax Appeals sustained the Commissioner (R. 30) and the decision was affirmed by the court below (R. 57).[1]

ARGUMENT

The court below correctly decided this case in accordance with the decisions of this Court in *Mother Lode Co.* v. *Helvering,* 317 U. S. 222, and *Riley Co.* v. *Commissioner,* 311 U. S. 55. Under the statute (Appendix, *infra*) a taxpayer cannot take percentage depletion unless he has made an express election in his "first return * * * in re-

[1] The same issue arose in determining a deficiency against the other partner, Rosander. The two cases were consolidated for consideration and decision before the Board of Tax Appeals (R. 21–22). Upon order of the Circuit Court of Appeals, the Rosander proceedings were suspended to await final decision in the instant case (R. 38–39).

spect of a property."[2] The *Mother Lode* case approved the regulations (Appendix, *infra*) which define the term "first return" to mean the return made for the first taxable year for which there is any item of income or deduction with respect to the property. Thus it is clear that the election indicated in the 1939 partnership return was ineffectual.

The *Riley* case, holding that an election cannot be made in an untimely amendment to a return, makes it equally plain that the partnership could not make an effective election in an untimely return filed for 1938. If a taxpayer were permitted to make his election in an untimely original return, he would have the same advantages of hindsight which, under the *Riley* case, he could not obtain through use of an untimely amendment. The Government would also be confronted with the same difficulties of administration.[3]

There is no conflict among the circuits. Neither *Ardbern Co.* v. *Commissioner,* 120 F. 2d 424

[2] The entire problem is moot with respect to tax years beginning after December 31, 1941. Under Section 145 of the Revenue Act of 1942, c. 619, 56 Stat. 798, depletion deduction may thenceforth be computed either on cost or percentage basis without regard to election.

[3] Although the partnership return for 1938 was the appropriate vehicle for stating the election, it may be urged that under the peculiar facts of this case the partnership was already precluded from taking percentage depletion by petitioner's failure to indicate an election in his individual return for 1938 in which he reported all income and deductions from the partnership property.

(C. C. A. 4th), nor *Del Mar Addition* v. *Commissioner,* 113 F. 2d 410 (C. C. A. 5th), the cases upon which petitioner relies, were concerned with the statute which is involved in the instant case. Both of those cases permitted untimely returns to be effective under different statutes upon considerations of equity, of which there are none present in the case at bar. Moreover, in view of this Court's later decision in *Scaife Co.* v. *Commissioner,* 314 U. S. 459, the *Del Mar Addition* case is probably no longer authoritative.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
SAMUEL H. LEVY,
MARYHELEN WIGLE,
Special Assistants to the Attorney General.

OCTOBER 1943.